SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1654.

RALPH GINZBURG,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITIONER'S REPLY BRIEF.

HAROLD E. KOHN,
LOUIS E. LEVINTHAL,
2600 The Fidelity Building,
Philadelphia, Pennsylvania 19109
Attorneys for Petitioner,
Ralph Ginzburg.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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I.

Petitioner respectfully points out to the Court that the Government's Memorandum in Opposition does not contest the crucial fact that petitioner was unaware of and would have been opposed to the attempt to mail any publication from Intercourse or Blue Ball, Pennsylvania. Rather, the Government seeks to hide behind the assertion, unsupported by any specific reference to the proceedings in the District Court, that this issue was "fully explored at the hearing before the district judge . . . ." Of course, it is the function of this Court on Certiorari to determine whether that issue, on which this Court laid great stress in its Opinion, was properly considered and correctly decided in the District Court.

The Government's Memorandum in Opposition seeks to perpetuate the misconception under which this case has

been prosecuted by referring (at p. 2) to the "magnitude of petitioner's enterprise" as the basis upon which to judge the sentence. The "enterprise" was not that of petitioner, but rather that of petitioner's corporate co-defendant. The conduct of petitioner as a corporate officer consisted of just one act, one general authorization to release the material. He did not mail a quantity of copies of the publications; nor did he pass upon each proposed mailing, or determine how many copies or to whom those copies would be mailed. His single executive act is now alleged to be the basis for multiple separate counts; yet it is uncontested that Petitioner did not make or approve the decision to make the individual mailings for which he stands convicted.

In purporting to deal with the important question of aggregation of counts for sentencing, the Government cites *Roth v. United States,* 354 U. S. 476, 493, and *United States v. Reidel* (No. 534, this Term). Neither decision is authority for the proposition that each copy mailed of a single publication is a separate offense. Transmission is transmission, whether what is transmitted is one or a million copies. In the absence of a clear statutory directive, Congress should not be presumed to have intended the ludricous result of a million-piece mailing being punishable by a five-million year prison term. Rather, the statute should be construed as logic and this Court's decision in *Ladner v. United States,* 358 U. S. 169, would dictate.

The case of *Gore v. United States,* 357 U. S. 386, which the Government would have us compare to the instant case, is completely inapposite. *Gore* merely reaffirmed the holding of *Blockburger v. United States,* 284 U. S. 299, that a single action could simultaneously violate several of the regulatory controls which Congress put upon the sale of narcotic drugs.[1] *Gore* dealt only with the particular enact-

1. 357 U. S. at 389.

ments regulating the flow of narcotics; even there, it should be noted that the defendant was convicted of breaking three different laws by one act, not of breaking such laws once for each of the fifty-five capsules of heroin and three capsules of cocaine which he sold.

Petitioner Ginzburg stands convicted of breaking only one law by his single act. Far closer to the instant case is that of *Bell v. United States,* 349 U. S. 81 (1955), distinguished as follows in *Gore:*

> "That case (BELL) involved application of the Mann Act—a simple provision making it a crime to transport a woman in interstate commerce for purposes of prostitution. We held that the transportation of more than one woman as a single transaction is to be dealt with as a single offense for the reason that when Congress has not explicitly stated what the unit of offense is, the doubt will be judicially resolved in favor of lenity." 357 U. S. at 391.

These issues in this case raising as they do serious questions under the First Amendment demonstrate that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD E. KOHN,
LOUIS E. LEVINTHAL,
Attorneys for Petitioner,
Ralph Ginzburg.